Supreme Court, U.S.
FILED
95 1879 MAY 20 1996
OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONER

*v.*

CAL-ALMOND, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

DREW S. DAYS, III
*Solicitor General*
FRANK W. HUNGER
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
RICHARD H. SEAMON
*Assistant to the Solicitor General*
BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

23pp

## QUESTION PRESENTED

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to a marketing order issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, to require the handlers of California almonds to fund a generic advertising program for that commodity.

## PARTIES TO THE PROCEEDINGS

The petitioner is the United States Department of Agriculture, which was the defendant below. The respondents, which were the plaintiffs below, are Cal-Almond, Inc., Carlson Farms, Gold Hills Nut Co., Inc., Gourmet Packing, Inc., Frazier Nut Farms, Inc., and Ellen Briones, Chapter 7 Trustee in Bankruptcy for Saulsbury Orchards and Almond Processing, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Constitutional, statutory, and regulatory provisions involved | 2 |
| Statement | 3 |
| Reasons for granting the petition | 13 |
| Conclusion | 17 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984) | 6 |
| *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980) | 3, 9 |
| *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984) | 9 |
| *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982) | 15 |
| *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990) | 9 |
| *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367 (9th Cir. 1995), petition for cert. pending, No. 95-1184 | 4, 12, 13, 14, 15 |


Constitution, statutes and regulations:


| | |
|---|---|
| U.S. Const. Amend. I | *passim* |
| Act of Nov. 25, 1970, Pub. L. No. 91-522, 84 Stat. 1357: | |
| § 1(1), 84 Stat. 1357 | 5 |
| § 1(2), 84 Stat. 1357 | 5 |
| Agricultural Act of 1954, Pub. L. No. 83-690, § 401(c), 68 Stat. 906 | 5 |
| Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* | 3, 13 |
| 7 U.S.C. 601 | 4 |
| 7 U.S.C. 602(1) | 5 |

| Statutes and regulations—Continued: | Page |
|---|---|
| 7 U.S.C. 602(3) | 5 |
| 7 U.S.C. 608a(6) | 2 |
| 7 U.S.C. 608c(1) | 5 |
| 7 U.S.C. 608c(1)-(4) | 2 |
| 7 U.S.C. 608c(2) | 5 |
| 7 U.S.C. 608c(3)-(4) | 6 |
| 7 U.S.C. 608c(6) | 2 |
| 7 U.S.C. 608c(6)(A) | 5 |
| 7 U.S.C. 608c(6)(I) | 5, 6, 15 |
| 7 U.S.C. 608c(7) | 2 |
| 7 U.S.C. 608c(7)(C) | 6 |
| 7 U.S.C. 608c(8) | 6 |
| 7 U.S.C. 608c(9)(B) | 6 |
| 7 U.S.C. 608c(10) | 8 |
| 7 U.S.C. 608c(11)(B) | 7 |
| 7 U.S.C. 608c(15) | 2 |
| 7 U.S.C. 608c(15)(A) | 8 |
| 7 U.S.C. 608c(15)(B) | 8 |
| 7 U.S.C. 608c(16)(A)(i) | 7 |
| 7 U.S.C. 608c(16)(B) | 7 |
| 7 U.S.C. 610 | 6 |
| 7 U.S.C. 610(b) | 2 |
| 7 U.S.C. 610(b)(2)(ii) | 5-6 |
| 7 U.S.C. 610(c) | 2, 6 |
| Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 403, 76 Stat. 632 | 5 |
| 7 C.F.R.: | |
| Pt. 932: | |
| Section 932.45(a)(2) | 16 |
| Pt. 981 (1992) | 4 |
| Section 981.13 | 3 |
| Section 981.16 | 3 |
| Section 981.30 | 2 |
| Section 981.33 | 6 |
| Section 981.37 | 6 |
| Section 981.38 | 2 |
| Section 981.39 | 2 |
| Section 981.40(a) | 2 |
| Section 981.40(d) | 2, 6 |

| Regulations—Continued: | Page |
|---|---|
| Section 981.40(e) | 2 |
| Section 981.41 | 2, 3, 6 |
| Section 981.41(c) | 7 |
| Section 981.41(e) | 6 |
| Section 981.80 | 2, 6 |
| Section 981.81(a) | 2, 6 |
| Section 981.441 | 2, 7 |
| Section 981.441(c)(2) | 8 |
| Section 981.441(c)(3)(i)(A) | 7 |
| Section 981.441(c)(3)(i)(B) | 7 |
| Section 981.441(c)(5) | 8 |
| Pt. 982: | |
| Section 982.58(b) | 16 |
| Pt. 989: | |
| Section 989.53(b) | 16 |
| Miscellaneous: | |
| 36 Fed. Reg. 20,887 (1971) | 7 |
| 58 Fed. Reg. (1993): | |
| p. 43,500 | 11 |
| p. 43,501-43,503 | 11 |
| 59 Fed. Reg. (1994): | |
| p. 4247 | 11 |
| p. 4248 | 11 |
| p. 35,222 | 11 |
| p. 35,224 | 7 |
| pp. 35,226-35,227 | 11 |

# In the Supreme Court of the United States

OCTOBER TERM, 1995

---

No.

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONER

*v.*

CAL-ALMOND, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## PETITION FOR A WRIT OF CERTIORARI

---

The Solicitor General, on behalf of the United States Department of Agriculture, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals concerning remedial issues (App. A)[1] is reported at 67 F.3d 874. The order of the district court (App. B) and the judg-

---

[1] References to "App." are to the separately bound volume of the appendix to the petition in this case.

ment of the district court (App. C) concerning remedial issues are unreported.

The initial opinion of the court of appeals (App. D), which addressed the First Amendment question presented herein and remanded the case to the district court for further proceedings on remedial issues, is reported at 14 F.3d 429. None of the four district court orders that were the subject of the initial court of appeals opinion (Apps. E, F, G, and H) are officially reported. Three of those orders (Apps. E, F, and G) are published, however, at 51 Agric. Dec. 44, 85, and 79 (respectively).

The opinions of the Judicial Officer of the Department of Agriculture (Apps. I, J, and K) are reported at 50 Agric. Dec. 23, 171, and 183 (respectively).

## JURISDICTION

The judgment of the court of appeals was entered on October 10, 1995. A petition for rehearing was denied on February 20, 1996. App. L. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 (Act) are 7 U.S.C. 608a(6), 608c(1)-(4), (6), (7) and (15), and 610(b) and (c). They are reproduced at App. M.

The relevant regulations implementing the Act are 7 C.F.R. 981.30, 981.38, 981.39, 981.40(a), (d) and (e), 981.41, 981.80, 981.81(a), and 981.441 (1992). They are reproduced at App. N.

## STATEMENT

This case involves a First Amendment challenge to provisions in the marketing order for California almonds issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* The challenged provisions impose mandatory assessments on the handlers (*i.e.*, processors and distributors, see 7 C.F.R. 981.13, 981.16 (1992)) of California almonds; those assessments are used in part to finance a generic advertising program for California almonds (7 C.F.R. 981.41 (1992)). The district court held that the generic advertising program does not violate the First Amendment. The Ninth Circuit reversed, holding that the program is unconstitutional under the three-part test for reviewing restrictions on commercial speech set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and remanded the case for further proceedings on the appropriate remedy for the perceived First Amendment violation. At the time of the Ninth Circuit's decision, the Secretary was considering revisions to a portion of the marketing order for California almonds, including provisions upon which the court had relied, in part, in striking down the generic advertising program. In light of the pendency of the proposed revisions, the Secretary did not petition for a writ of certiorari to review the Ninth Circuit's judgment with respect to the First Amendment issue at that time.

In a subsequent case, however, the Ninth Circuit relied on its decision in this case to sustain a First Amendment challenge to the generic advertising programs for California peaches, nectarines, and

plums established under the AMAA marketing orders for those fruits. See *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367 (1995). The Secretary has filed a petition for a writ of certiorari in *Wileman Bros.* seeking review of the Ninth Circuit's holding on the First Amendment issue in that case. No. 95-1184 (filed Jan. 24, 1996).

On remand in the present case, the district court entered a monetary award against the government. The court of appeals affirmed in part and reversed in part, holding that respondents were entitled to a refund of the assessments that they had paid for administration of the generic advertising program, but were not entitled to reimbursement of the money that they had paid to third parties for "creditable" advertising—*i.e.*, advertising for which they had received credit against their assessments.[2]

1. a. Congress enacted the AMAA based on the following finding (7 U.S.C. 601):

> [T]he disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure[,] and * * * these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

---

[2] Respondents' First Amendment challenge to the generic advertising program for almonds concerned the crop years 1980-1981 through 1992-1992. Hereafter, we cite to the almond marketing order in effect in 1992, codified at 7 C.F.R. Pt. 981 (1992), unless otherwise noted.

The goal of the Act is to "establish and maintain * * * orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). The Act specifies several means by which the Secretary is to bring about such conditions. Those means include the establishment of "minimum standards of quality and maturity" and of "production research, marketing research, and development projects." 7 U.S.C. 602(3). This case concerns the latter means: marketing promotion in the form of a generic advertising program.

To carry out his duties under the Act, the Secretary is authorized to issue marketing orders for certain commodities, including almonds. 7 U.S.C. 608c(1) and (2). A marketing order may include limits on the quantity, quality, grade, and size of the commodity that may be marketed. 7 U.S.C. 608c(6)(A). It may also provide for "production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption" of the commodity. 7 U.S.C. 608c(6)(I). Such projects may—with respect to certain commodities, including almonds—include "paid advertising." *Ibid.*[3] The projects are funded by mandatory assessments on handlers. *Ibid.*; see also 7 U.S.C.

---

[3] The provision authorizing marketing orders to provide for marketing research and development projects was added to the AMAA in 1954. Agricultural Act of 1954, Pub. L. No. 83-690, § 401(c), 68 Stat. 906. The provision specifying that those projects may include "paid advertising" with respect to certain commodities was first added to the AMAA by the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 403, 76 Stat. 632 (authorizing paid advertising of cherries); see also Act of Nov. 25, 1970, Pub. L. No. 91-522, § 1(1) and (2), 84 Stat. 1357 (extending "paid advertising" provision to almonds).

610(b)(2)(ii) (handlers shall pay annual assessments equal to their pro rata share of expenses of administering marketing orders). The marketing orders for almonds and certain other commodities, however, may authorize a handler to receive credit against its assessment for amounts it spends in purchasing its own advertising. 7 U.S.C. 608c(6)(I).

Before issuing a marketing order for a commodity, the Secretary conducts a formal rulemaking proceeding and must in general obtain approval of the order by either two-thirds of the producers (growers) of the commodity, or the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and (9)(B); see *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Once in place, a marketing order is administered under the Secretary's supervision by a committee that typically is composed of producers and handlers of the regulated commodity. 7 U.S.C. 608c(7)(C), 610. The members of the committee are appointed by the Secretary, serve without compensation, and are subject to removal by the Secretary at any time. See, *e.g.*, 7 C.F.R. 981.33, 981.37, and 981.40(d) (relating to Almond Board of California). Among other duties, the committee recommends a yearly budget for administering the marketing order, which includes a budget for advertising and other types of promotion; the Secretary may accept or reject that recommendation. 7 U.S.C. 608c(7)(C); see, *e.g.*, 7 C.F.R. 981.41. After the Secretary adopts a budget, he promulgates a regulation prescribing assessments on handlers to fund the budget. See 7 U.S.C. 610(c); 7 C.F.R. 981.41(e), 981.80, 981.81(a).

A marketing order may be discontinued in two ways. The Secretary must terminate or suspend an

order if he finds that it "obstructs or does not tend to effectuate the declared policy" of the AMAA. 7 U.S.C. 608c(16)(A)(i). In addition, the Secretary must terminate an order when he determines that a majority of the producers does not support it. 7 U.S.C. 608c(16)(B).

b. This case concerns the marketing order for California almonds, which is administered by the Almond Board of California.[4] The order was first promulgated in 1950 (App. 51a), and it has authorized the Board to conduct a generic advertising program for California almonds since 1971 (36 Fed. Reg. 20,887 (1971); see 59 Fed. Reg. 35,224 (1994)). The Board's activities, including its conduct of the generic advertising program, are funded by mandatory assessments on handlers based on the volume of the almonds that they handle. See App. 52a & n.1.

At relevant times, the marketing order for California almonds permitted a handler to receive credit against its assessment for purchasing its own advertising. 7 C.F.R. 981.41(c) (1992). Credit was available whether the handler's advertising promoted California almonds generically or the handler's own brand. 7 C.F.R. 981.441(c)(3)(i)(A) and (B). To earn credit, however, the advertising had to satisfy the requirements of the creditable advertising regulation, 7 C.F.R. 981.441. Under that regulation, "[t]he clear and evident purpose of each advertisement" had to be "to promote the sale, consumption, or use of

---

[4] The fact that the order is limited to almonds grown in California reflects the AMAA's requirement that marketing orders be restricted "to the smallest regional production areas * * * practicable" and consistent with the Act. 7 U.S.C. 608c(11)(B).

California almonds." 7 C.F.R. 981.441(c)(2). In addition, the regulation provided that no credit was available for advertising that referred to "more than two complementary branded products"; for advertising that promoted "noncomplementary" products or "competing nuts"; or for advertising that "direct[ed] consumers to one or more named retail outlets" not operated by the handler. 7 C.F.R. 981.441(c)(5). Handlers were free to engage in any advertising that they wished, see 7 U.S.C. 608c(10), but they could receive credit only for advertising that met the regulatory requirements.

2. a. The present case arose from administrative petitions filed with the Secretary of Agriculture by respondents under 7 U.S.C. 608c(15)(A), which permits handlers to ask the Secretary to modify, or exempt them from, marketing orders that are "not in accordance with law." Respondents alleged, among other things, that the generic advertising program for California almonds, including certain provisions of the creditable advertising regulation, violated the First Amendment. App. 216a, 291a-292a. Upon review of the decisions on the petitions by an administrative law judge, the Judicial Officer of the Department of Agriculture (JO) rejected respondents' First Amendment challenge. App. 291a-299a, 420a-424a.

b. Respondents sought review of the JO's decisions in the United States District Court for the Eastern District of California, pursuant to 7 U.S.C. 608c(15)(B). The district court affirmed the JO's decisions. App. 96a-150a, 151a-185a, 186a-197a.

c. The court of appeals reversed in relevant part, holding that the generic advertising program for

California almonds violates the First Amendment. App. 49a-95a.[5]

The court of appeals held, first, that the program implicates respondents' "right to free speech and their right to free association." App. 58a. The court based that holding primarily on *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990). In *Frame*, the Third Circuit had held that the generic advertising program for beef that is established by federal law and funded by mandatory industry assessments implicates the First Amendment rights of beef producers subject to the assessments. The court of appeals in this case stated that "[t]he Board's almond promotion program closely resembles the beef promotion program at issue in *Frame*." App. 57a.

The Third Circuit in *Frame upheld* the generic beef promotion program under the standard applied in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), to a free-association claim. Here, in contrast, the Ninth Circuit struck down the generic almond promotion program under what it characterized as the "less stringent" standard articulated in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, *supra*, for reviewing restrictions on commercial speech. App. 59a-60a. The Ninth Circuit recognized that the almond program satisfied the first part of the *Central Hudson* test by promoting the "substantial" govern-

---

[5] The court of appeals rejected respondents' other challenges to the administration of the marketing order for California almonds, which concerned the procedures by which assessments were imposed under the order (App. 70a-79a); the reserve requirements used to stabilize the volume of almonds marketed (App. 79a-93a); and the administrative procedure for challenging the order (App. 93a-94a).

mental interest in "stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry." App. 62a.

The Ninth Circuit held, however, that the almond program did not satisfy the second part of the *Central Hudson* test, because, in the court's view, it did not "directly advance" the underlying governmental interest. The court believed that, to establish that the creditable advertising portion of the program satisfied the "directly advances" requirement, the government had to show "both that the advertising for which credit is *granted* is *better* at selling almonds than the Board's own efforts *and* that the advertising for which credit is *denied* is *worse* at selling almonds than the Board's own efforts." App. 62a-63a. The court determined that the government had not made that showing. App. 64a-67a. The court considered it "a more difficult question" whether the "entire assessment-funded almond promotion program" (as distinguished from the creditable advertising provisions viewed in isolation) directly advanced the government's interest in promoting almond consumption. App. 67a. The court ultimately decided that question against the government, however, holding that the government had not shown that advertising conducted under the program was more effective in promoting almond consumption than advertising by individual handlers would be. App. 67a-68a.

The court of appeals also held that the program failed the third part of the *Central Hudson* test, because it was more extensive than necessary to further the governmental interest. App. 69a-70a. The court based that holding in part on its determination

that the government had not justified certain restrictions in the creditable advertising regulation. App. 69a.

The court of appeals remanded the case to the district court for further proceedings on the appropriate remedy. App. 94a-95a.

3. The Ninth Circuit issued its decision on respondents' First Amendment challenge in December 1993. In August 1993, while the case was under submission to the Ninth Circuit, the Secretary promulgated an interim final rule proposing revisions to the creditable advertising regulation in the almond marketing order. 58 Fed. Reg. 43,500. Several of the proposed revisions concerned restrictions on the types of advertising by individual almond handlers for which credit was available. See *id.* at 43,501-43,503. Because the Ninth Circuit had based its decision in part on the restrictions as to which the Secretary was considering revisions, the Secretary did not at that time petition this Court for a writ of certiorari to review the Ninth Circuit's judgment on the First Amendment issue.

In January 1994, the Secretary reopened the period for comments on the proposed revisions to the creditable advertising regulation. 59 Fed. Reg. 4247. In particular, the Secretary invited comments on the potential effect of the Ninth Circuit's decision on the creditable advertising regulation. *Id.* at 4248. The Secretary adopted a final rule revising the creditable advertising regulation in July 1994. *Id.* at 35,222. The revisions, *inter alia*, eliminate many of the former restrictions on the types of advertising for which an individual handler may receive credit against its assessment. See *id.* at 35,226-35,227.

4. On remand in the present case, the district court ordered the government to pay respondents approximately $4.3 million, which consisted of (1) $1.8 million in assessments that respondents had paid to the Almond Board or into a court escrow account; and (2) $2.5 million that respondents had paid third parties for creditable advertising. App. 43a-48a.

The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-17a. It reversed the order requiring the government to reimburse respondents for their expenditures on creditable advertising, holding that their claim for a monetary award was barred by sovereign immunity. App. 4a-9a. The court of appeals affirmed the district court's refusal to reduce the amount of the refund to take into account the benefit that respondents had received from the generic advertising purchased with their assessments. App. 9a-13a.[6]

5. In a subsequent Ninth Circuit case, handlers of California peaches, nectarines, and plums, relying on the Ninth Circuit's initial decision in this case, brought a First Amendment challenge to the generic advertising programs established under the AMAA marketing orders for those commodities. The Ninth Circuit sustained the challenge, finding it "largely governed by *Cal-Almond*." See *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367, 1377 (1995). The Secretary has filed a petition for a writ of certiorari to review the Ninth Circuit's ruling on the First Amendment issue in *Wileman Bros.*, petition for cert. pending, No. 95-1184 (filed Jan. 24, 1996).

---

[6] The court of appeals subsequently denied respondents' petition for rehearing and rejected their suggestion of rehearing en banc. App. 474a-475a.

## REASONS FOR GRANTING THE PETITION

1. In both this case and *Wileman Bros. & Elliott, Inc.* v. *Espy*, 58 F.3d 1367 (1995), the Ninth Circuit sustained First Amendment challenges to generic advertising programs administered under marketing orders issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* Those rulings warrant review by this Court for the reasons set forth in the Secretary's petition for a writ of certiorari in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, petition for cert. pending, No. 95-1184 (filed Jan. 24, 1996).[7]

2. We believe that *Wileman Bros.* provides a more appropriate vehicle for review of the First Amendment issue than does this case. We therefore suggest that the Court hold the petition in this case for disposition in light of the Court's disposition of the Secretary's petition in *Wileman Bros.*

As explained above, the Ninth Circuit's decision on the First Amendment issue in this case turned in part on certain aspects of the creditable advertising regulation then in effect. In particular, the court determined that the regulation was overly restrictive with respect to the types of advertising for which handlers could receive credit.[8] That determination, in

---

[7] We have provided respondents with a copy of the petition and reply brief filed by the Secretary in *Wileman Bros.*, as well as a copy of the Secretary's supplemental brief in that case informing the Court of the recent enactment of certain statutory provisions concerning generic advertising under marketing orders.

[8] App. 62a-63a (government was required, but failed, to show "both that the advertising for which credit is *granted* is *better* at selling almonds than the Board's own efforts *and* that the advertising for which credit is *denied* is *worse* at selling

turn, was based in part on the court's views as to certain features of the almond market, such as distribution patterns and end uses for almonds.[9] The court's determination that the creditable advertising regulation was overly restrictive, in light of the manner in which almonds were marketed, affected the court's analysis of the generic advertising program under both the "directly advances" and the "no more extensive than necessary" parts of the *Central Hudson* test.[10]

In its subsequent decision in *Wileman Bros.*, the Ninth Circuit made clear that its decision in the present case was not to be limited to generic advertising programs that have the same restrictions on creditable advertising as were imposed under the generic advertising program for almonds and that concern commodities for which the market is similar to that for almonds. Indeed, the Ninth Circuit in *Wileman Bros.* relied on its *Cal-Almond* decision at every step of its analysis.[11] Thus, the Ninth Circuit's

---

almonds than the Board's own efforts"), 69a ("USDA offers *no* justifications for the restrictions that *deny* credit for certain advertisements").

[9] App. 65a (emphasis omitted) (creditable advertising restrictions "hinder[ed]" efforts of certain handlers by withholding credit for advertising cereal or ice cream containing California almonds and for advertising directing consumers to retail stores not operated by handlers), 66a-67a (creditable advertising regulation favored Blue Diamond Inc. because of its dominance of domestic retail market for almonds).

[10] App. 64a ("USDA * * * cannot show that the creditable advertising regulations 'directly advance' the government's interest"), 70a ("The creditable advertising regulations * * * are more extensive than necessary.").

[11] 58 F.3d at 1377 (First Amendment analysis of generic advertising programs for California peaches, nectarines, and

decision on the First Amendment issue in this case warrants invoking this Court's jurisdiction, for the same reason as does the Ninth Circuit's decision on that issue in *Wileman Bros.*

In our view, however, the Ninth Circuit's reliance in this case on the former creditable advertising regulation in the marketing order for California almonds and on certain features of the market for California almonds makes this case a less appropriate vehicle for plenary review of the First Amendment issue than is the *Wileman Bros.* decision. For one thing, the Secretary has made no provision for creditable advertising in most of the AMAA marketing orders that authorize generic promotion programs.[12] Moreover, the creditable advertising regulations that

---

plums was "largely governed by" prior decision in *Cal-Almond*); see also *id.* at 1378 (relying on *Cal-Almond* to hold that generic advertising program should be reviewed under *Central Hudson* test and that programs at issue satisfied the first part of the test because they promoted "substantial" governmental interest), 1378-1379 (holding that programs did not satisfy the "directly advances" part of the *Central Hudson* test, based in part on determination that "[t]he same state of affairs" obtained in marketing of peaches, nectarines, and plums as obtained in marketing of almonds), 1380 (relying on *Cal-Almond* in holding that programs at issue were more extensive than necessary to serve governmental interest).

[12] Under 7 U.S.C. 608c(6)(I), the Secretary is specifically authorized (but not required) to allow credits for individually purchased advertising by handlers of almonds, filberts, raisins, walnuts, olives, and Florida Indian River grapefruit. The absence of specific authorization for such credits under other generic advertising programs may imply the absence of authorization. See *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). In any event, the Secretary has not provided for creditable advertising in connection with other commodities for which he has issued marketing orders under the AMAA.

are included in other marketing orders vary both from one another and from the creditable advertising regulation for California almonds that was reviewed below. See 7 C.F.R. 932.45(a)(2) (olives grown in California), 982.58(b) (filberts/hazelnuts grown in Oregon and Washington), and 989.53(b) (raisins produced from grapes grown in California). Finally, as explained above, the creditable advertising regulation for California almonds has itself been revised significantly since the first court of appeals decision below was issued. See p. 11, *supra*.

Although the First Amendment issue presented here and in *Wileman Bros.* warrants review by this Court, there is no continuing importance to the manner in which the First Amendment applies to the particulars of the former creditable advertising regulation in the marketing order for California almonds. Furthermore, to the extent that this Court's resolution of the First Amendment issue in this case might turn upon the particulars of the former regulation, the Court's decision could leave uncertainty regarding the validity of numerous other statutorily created generic advertising programs that make no provision or different provision for creditable advertising. Accordingly, *Wileman Bros.* provides a more appropriate vehicle for resolution of the First Amendment issue than does this case.

## CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition for a writ of certiorari in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, No. 95-1184 (filed Jan. 24, 1996).

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

FRANK W. HUNGER
*Assistant Attorney General*

EDWIN S. KNEEDLER
*Deputy Solicitor General*

RICHARD H. SEAMON
*Assistant to the Solicitor General*

BARBARA C. BIDDLE
JEFFRICA JENKINS LEE
*Attorneys*

MAY 1996